

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DEREK R. ALLEN	:	NO. 97-487

MEMORANDUM AND ORDER

HUTTON, J.

February 23, 1998

Presently before this Court is the Motion by Defendant Derek R. Allen to Suppress Firearm (Docket No. 12) and the Government's response thereto.

I. BACKGROUND

On July 13, 1997, the Philadelphia Police Department received an anonymous tip that a man in the vicinity of an "A-Plus mini-market" at 52nd and Spruce Streets was carrying a gun. Govt's Resp. at 2. The informant stated that the man was in a black Mercedes with a certain tag number and was wearing a white t-shirt with the word "Air" on it. Id. At approximately 4:50 a.m., Philadelphia Police Lieutenant John T. Thompson ("Thompson") responded to a radio call relaying this information. Id. Thompson was driving a police vehicle and dressed in a police uniform.

Thompson arrived at the mini-market within minutes of receiving the call. Id. Thompson saw a black Mercedes parked outside the entrance of the mini-market, with a license plate

number matching the radio description. Thompson also saw a black man standing near the car wearing a white t-shirt with the word "Air" on it. Id. The man was later identified as the defendant.

Thompson exited his vehicle and started to approach the defendant. The defendant was walking towards his car and in Thompson's direction. Thompson saw that the defendant was carrying a container, but, as the two men advanced towards each other, the defendant dropped the container. When the defendant crouched to recover the container, Thompson ordered the defendant to stop. The defendant immediately stood up, turned, and ran away from Thompson. As the defendant fled, Thompson saw him reach into his waistband.

Philadelphia Police Officer Paul Sprigg ("Sprigg") arrived after Thompson at the mini-market. When Sprigg was approaching the defendant and Thompson, he saw the defendant "reach for something under his shirt in his front waist area" and run "away from the side of the black Mercedes towards the gas pumps." Id. Sprigg ordered the defendant to stop, but the defendant ran out of the parking lot and south on 52nd Street, towards Pine Street. Id. Sprigg saw that the defendant was holding a gun, and he chased the defendant east on Pine Street. Id. Thompson remained in the parking lot.

Sprigg briefly lost sight of the defendant when the defendant turned onto Pine Street. However, when Sprigg reached

the corner of Pine and 52nd Streets, he saw the defendant heading east on Pine Street towards the corner of Pine and 51st Streets. Id.

As the defendant continued running east on Pine Street, the defendant was apprehended by Philadelphia Police Officers Andrew Jericho ("Jericho") and Robert Dunn ("Dunn"), who arrived separately in their police vehicles less than one minute after the defendant started to run. Id. Jericho placed the defendant under arrest, but the officers did not find a gun in the defendant's possession. Id. at 3. "Officers Dunn and Sprigg then retraced the path taken by the defendant and [Dunn] found a [loaded] .38 caliber Smith & Wesson revolver lying on the ground just above the northeast corner of 52nd and Pine Streets." Id.

A grand jury indicted and charged the defendant with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Following his indictment, the defendant filed the instant motion to suppress the handgun. On February 23, 1998, this Court held a suppression hearing.

II. DISCUSSION

The Fourth Amendment of the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation" U.S. Const. amend. IV. When someone is searched without a warrant, the government bears the burden to demonstrate that the search and seizure was reasonable. United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995), cert. denied, 116 S. Ct. 2528 (1996).

In this case, it is undisputed that the police stopped the defendant without a search warrant. Def.'s Mot. Suppress at 2; Govt's Resp. at 2. Therefore, the burden shifts to the government to show the stop was lawful. To meet this burden, the government argues that because the officers corroborated the information contained in the tip, they were justified in attempting to stop the defendant.¹

In Terry v. Ohio, 392 U.S. 1 (1968),

the Supreme Court held that law enforcement officers have the authority under the Fourth Amendment to stop and temporarily detain citizens short of an arrest, and that such a stop is justified by less than the probable cause necessary for an arrest. Under Terry, a police officer may detain and investigate citizens when he or she has a reasonable suspicion that "criminal activity may be afoot." Id. at 30.

1. The defendant was not "seized" at the time he threw the gun, because he discarded the weapon prior to his capture. California v. Hodari D., 499 U.S. 621, 625-26 (1991) (where policeman's show of authority is ignored by fleeing suspect, the suspect is not considered "seized" under the Fourth Amendment). Thus, the proper analysis is whether the officers properly attempted to stop the defendant. See United States v. Andrews, 754 F. Supp. 442, 444 (E.D. Pa. 1990).

United States v. Roberson, 90 F.3d 75, 77 (3d Cir. 1996).²

Moreover, "an informant's tip can provide . . . reasonable suspicion for a Terry stop." Id.

In Alabama v. White, 496 U.S. 325 (1990), the Supreme Court addressed the appropriate standard to apply in determining whether an anonymous tip could provide reasonable suspicion for a Terry stop.³ The Supreme Court found that the decision of whether an anonymous tip could provide the basis for a Terry stop had to be based on the totality of the circumstances. White, 496 U.S. at 332-33. However, unlike those situations where police rely on an anonymous tip to conduct a search or seizure, the Court found that a lower standard applied where police relied on an anonymous tip to conduct a Terry stop. Roberson, 90 F.3d at 78 (quoting White, 496 U.S. at 329) (While the White "tip was not as detailed, and the corroboration was not as complete, as in Gates," the tip provided appropriate grounds for the stop because

2. The United States Court of Appeals recently stated:

In Terry v. Ohio, the Supreme Court held that a police officer may conduct a reasonable search for weapons for his own protection "where he has reason to believe that he is dealing with an armed and dangerous individual." The Court stated that a pat-down for weapons can occur only where the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

Moorefield, 111 F.3d 10, 13 (3d Cir. 1997) (citations omitted).

3. In Illinois v. Gates, 462 U.S. 214 (1983), "the Supreme Court held that the determination of whether an anonymous tip could provide the basis for probable cause had to be based on the totality of the circumstances." Robinson v. Clemons, No.CIV.A.96-405, 1998 WL 24252, at * 5 (D. Del. Jan. 9, 1998).

the 'required degree of suspicion was likewise not as high.'"). Still, the White court "stressed two factors: (1) an officer's ability to corroborate significant aspects of the tip, and (2) the tip's ability to predict future events." Roberson, 90 F.3d at 77.

The Third Circuit has recently indicated that the factors required for a proper Terry stop based on an anonymous tip differ based on the crime described by the tip. In United States v. Roberson, the Third Circuit addressed the White standard as applied to an anonymous drug tip. In that case, police officers received an anonymous tip that "a heavy set, black male wearing dark green pants, a white hooded sweatshirt, and a brown leather jacket was selling drugs on the 2100 block of Cheltenham Avenue." Roberson, 90 F.3d at 75. When officers arrived on the scene, less than one minute after receiving the call, they made eye contact with a man and watched him walk "casually over" and lean into a car parked nearby. Id. at 76. The officers exited their vehicle, and ordered the defendant away from the car. Id. As they approached the defendant, the officers saw a gun extending from the defendant's pants. Id. The officers patted the defendant down and placed him under arrest. Id.

The Third Circuit found that the informant's tip did not meet the White test. The Court stated that because the tip did not include any predictive facts, "no future actions could be

corroborated." Id. at 80. The Roberson Court stated that "[t]hese omissions probably would not have invalidated the stop, if, after corroborating readily observable facts, the police officers had noticed unusual or suspicious conduct on [the defendant's] part." Id. (citations omitted).⁴ However, the officers failed to observe any illegal or suspicious behavior before ordering the defendant to stop. Id. Thus, the court stated:

Refusing to stretch Alabama v. White any further, we hold that the police do not have reasonable suspicion for an investigative stop when, as here, they receive a fleshless anonymous tip of drug-dealing that provides only readily observable information, and they themselves observe no suspicious behavior. To hold otherwise would work too great an intrusion on the Fourth Amendment liberties, for any citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was selling drugs. Indeed anyone of us could face significant intrusion on the say-so of an anonymous prankster, rival, or misinformed individual. This, we believe, would be unreasonable.

Id. at 80 (footnote omitted).

However, the court declined to require the same standard where "the tip involves an allegation that the defendant

4. Thus, even where the tip fails to meet the White requirement of predicting future conduct, police are not "powerless to act." Roberson, 90 F.3d at 81. "The officer could have set up surveillance of the defendant." Id. (citing United States v. Clipper, 973 F.2d 944, 951 (D.C. Cir. 1992), cert. denied, 506 U.S. 1070 (1993)). "If the officers then observed any suspicious behavior or if they observed suspicious behavior as they approached the defendant in this case, they would have had appropriate cause to stop - and perhaps even arrest - him." Roberson, 90 F.3d at 81.

was carrying a gun rather than dealing drugs. Under those circumstances, a different rule may apply." Id. at 81 n. 4. In a footnote discussion, the Third Circuit examined two cases from other circuits addressing an anonymous gun tip: United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992), cert. denied, 506 U.S. 1070 (1993) and United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996). In each of these cases, police stopped a person based on an anonymous tip that a black man, located on a particular street corner, in certain color clothing, was carrying a gun. Clipper, 973 F.2d at 945-46; DeBerry, 76 F.3d at 885.

In Clipper, after corroborating the person's location and general description, and without noticing any unusual behavior, the police officers frisked the defendant at gunpoint. Clipper, 973 F.2d at 946. The District of Columbia Circuit upheld the stop, finding that "society's plain interests in protecting its members, and those who serve them, from armed and dangerous persons" controlled. Id. at 951. The court distinguished the case from drug cases, stating that "[w]here guns are involved, . . . there is the risk that an attempt to 'wait out' the suspect might have fatal consequences." Id. Thus, the risk of police searches based on fabricated tips was overcome by the interests of safety. Id.

In DeBerry, after corroborating the person's location and general description, an officer walked towards the defendant

and said that he wanted to talk. DeBerry, 76 F.3d at 885. The defendant turned and "moved his hands as if he might draw his gun." Id. at 885. The officer drew his gun and frisked the defendant. Id. "The Seventh Circuit upheld the stop, relying in part on the defendant's threatening gesture However, the court in dicta stated that its holding would have been the same even in the absence of the gesture." Roberson, 90 F.3d at 81 n. 4 (citing DeBerry, 76 F.3d at 885-86). The DeBerry Court followed the Clipper court's reasoning, finding that the interest in protecting people from armed individuals outweighed the "right of the people to be let alone." DeBerry, 76 F.3d at 886.

As explained above, the Third Circuit discussed these cases, but did not adopt them. Instead, it chose to "leave that question for another day." Roberson, 90 F.3d at 81 n. 4. However, the Third Circuit did indicate that it may adopt the DeBerry/Clipper reasoning when presented with the appropriate case.

The instant case falls directly into the DeBerry/Clipper scenario. Here, the Philadelphia Police Department received an anonymous tip similar to the ones in DeBerry and Clipper. The tip included the defendant's sex, his exact location, his clothing, the make of his car, and his license plate number. Moreover, the informant stated that the defendant was carrying a gun. When Thompson and Sprigg arrived,

they saw a man clearly fitting the description. However, because the tip did not include any predictive facts, "no future actions could be corroborated." Roberson, 90 F.3d at 80.

It is clear from the Third Circuit's discussion in Roberson that had this been a tip concerning drug activity, Thompson would not have been authorized in making a Terry stop prior to witnessing any suspicious behavior. However, the "element of imminent danger distinguishes a gun tip from one involving possession of drugs." Clipper, 973 F.2d at 951. This Court finds that Thompson's corroboration of all of the innocent details of the gun tip gave rise to a reasonable suspicion that the defendant had a gun. Thus, the officers were justified in attempting to conduct a Terry stop. Accordingly, the defendant's Motion must be denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 23rd day of February, 1998, upon consideration of the Motion by Defendant Derek R. Allen to Suppress Firearm (Docket No. 12), IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.